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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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January 6, 1986

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Appendix A

Opinion of the Court of Appeals of the State of New York, July 9, 1985

In the Matter of BROOKLYN UNION GAS COMPANY, Respondent, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Appellant, and CITY OF NEW YORK, Intervenor-Appellant.

In the Matter of NATIONAL FUEL GAS DISTRIBUTION CORPORATION et al., Respondents, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Appellant, and NIAGARA-WHEATFIELD CENTRAL SCHOOL DISTRICT, Intervenor. (And Nine Other Proceedings.)

Opinion of the Court

ALEXANDER, J.

The issue presented on these appeals is whether the special franchise properties of the Brooklyn Union Gas Company, and those of National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation, are specialty property, to be valued for special franchise assessment and taxation purposes by the reproduction-cost-new-less-depreciation (RCNLD) method, or whether a capitalization-of-income method of valuation is an acceptable method of valuation of such property. The Appellate Division, in both cases, has held that the petitioners' special franchise properties are not "specialty properties" and therefore that the capitalization-of-income method is an acceptable method of assessing the value of special franchise property in New York State. We disagree and therefore reverse the Appellate Division orders appealed from.

I

Brooklyn Union Gas Company (Brooklyn Union) is a distributor of natural gas, servicing customers in Kings

County, Queens County and half of Richmond County. It operates its gas distribution business through a system of underground mains, services and related measuring and regulatory equipment that is placed in public streets and thoroughfares. This property, by statutory definition, constitutes a "special franchise".[1]

Brooklyn Union's distribution system of mains is primarily located under public streets, and is composed of 63% cast iron mains with joints that operate at 15 pounds of pressure and require frequent repair. No new cast iron pipes have been installed since the mid-1950's, and none can now be installed because of the prohibitions of Public Service Commission rules. The mains are also composed of steel (34.25%) and plastic (.75%) and 2% of the system of mains belongs to New York Facilities, a joint operation of Brooklyn Union, Consolidated Edison and Long Island Lighting Company. Special Term found that the system would not be reproduced today in its present form.

Distribution's pipelines in New York are composed 9% plastic, 25% coated steel, 63% bare steel and 4% cast iron. Special Term found that Distribution's system would not be exactly reproduced in its present form, but would be reasonably expected to be replaced.

Special franchise property is defined as real property by Real Property Tax Law (RPTL) § 102 (12). It is subject to

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1. Real Property Tax Law § 102 (17) provides: "'Special franchise' means the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance. For purposes of assessment and taxation a special franchise shall include the value of the tangible property situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith."

annual assessment by the State Board of Equalization and Assessment (RPTL 600) and all taxes and special ad valorem levies for county, city, town, village, school or special district purposes are imposed on the final assessment of each special franchise (RPTL 622). Both the tangible real property and the intangible right to use the streets and thoroughfares (the intangible franchise) are components of a special franchise, and the values of each must be added to determine the value of the entire special franchise.

In April 1980, the State Board of Equalization and Assessment (SBEA) made tentative equalized valuations for the 1980-1981 tax year of the special franchise properties belonging to Brooklyn Union, Distribution and Supply. Each challenged the tentative assessment, contending that it was erroneous by reason of overvaluation, inequality and illegality. Distribution and Supply's challenge was rejected and they instituted proceedings against SBEA pursuant to RPTL article 7 contesting these final valuations.

Brooklyn Union's challenge to its valuation was also rejected by SBEA and instead of being reduced its final equalized valuation was increased because of a revised city-wide equalization rate. Brooklyn Union also instituted an article 7 proceeding against SBEA charging overvaluation, illegality and inequality.

At the trial of the Brooklyn Union proceeding, SBEA did not file an appraisal report or offer any testimony through its personnel as to the valuation method employed. Rather, it relied on the appraisal report and testimony of an expert employed by the City of New York (the city had been granted leave to intervene). The trial court rejected his testimony, finding that he lacked sufficient background and experience to qualify as an expert appraiser of special franchise property. The court also rejected his appraisal

report because it failed to comply with the rules of the Appellate Division as to form and content. The court concluded that the record was barren of any evidence of the appraisal method employed by SBEA in arriving at its valuations. The court noted that the city's expert used the RCNLD method, but that the value he arrived at was more than $100,000,000 higher than that arrived at by SBEA. The court concluded that he did not perform the assessments for SBEA.

The court accepted the expert opinions of the petitioner's witnesses and their valuation of the special franchise property, which appraisals and valuations were arrived at through capitalization-of-income and original-cost-less-depreciation (rate base) appraisal methods. The court accepted the capitalization-of-income method of valuation as "a legitimate method for valuing a special franchise *** especially when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form." The court determined the final equalized values of Brooklyn Union's special franchise property, located in Kings, Queens and Richmond Counties, for the tax year 1980-1981, to be $83,336,183, $45,511,625 and $25,990,355 respectively. These valuations were significantly lower than in the final assessments of SBEA.

The Appellate Division affirmed, concluding that the "capitalization of income method used [by petitioner's experts] herein provides the most accurate method of determining value", and that rejection of the RCNLD method of appraisal was proper since "the system would never be reproduced in its present form but would be replaced with a new completely modern system". The court found that, in the parlance of an expert real estate appraiser, "[r]eproduction means replacement with an exact model" which "[i]n this case *** is totally unrealistic". Thus, the court held that Brooklyn Union's franchise property "could not be considered a specialty since it is

unreasonable to conclude that the facility could be replaced on an economic basis." The court noted, moreover, that it would "reach the same result even if the facility were considered a specialty" (101 AD2d 414, 416-417).

National Fuel Gas Distribution Corporation (Distribution) and National Fuel Gas Supply Corporation (Supply) are subsidiaries of National Fuel Gas Company. Distribution is a multi-state retailer of natural gas serving customers in New York, Pennsylvania and Ohio. Supply accumulates and sells natural gas at the wholesale level, serving essentially the same geographic area as Distribution. The area served by Distribution and Supply in New York State comprises 12 counties in western New York. They operate this portion of their systems through pipes, mains, conduits and other tangible personal property located in public streets and thoroughfares. This property too is a "special franchise."

Distribution and Supply commenced 10 separate proceedings challenging the SBEA assessments alleging overvaluation, inequality and illegality. The proceedings were consolidated for trial and Niagara-Wheatfield Central School District was permitted to intervene. SBEA appraisal reports, received in evidence, showed that Distribution and Supply's special franchises for 1980 were assessed by computing the reconstruction cost new of all their tangible special franchise property in New York and deducting appropriate figures for depreciation from all causes. SBEA added 5% of the value of the tangible property as the value of the intangible franchises. The total full value assessments for Distribution and Supply were then allocated to the individual taxing jurisdictions by applying a ratio of surviving original cost in each jurisdiction to total surviving original cost for each company. Appropriate equalization rates were applied. These computations produced final total equalized special franchise assessments of $65,071,328 for Distribution and $813,694 for Supply.

Appendix A

Petitioners' experts arrived at full market values of the special franchise properties of Distribution and Supply by using capitalization-of-income under the "unit" method of accounting, with petitioners' operating multistate systems as the "unit". They allocated a proportionate value to those portions of the "unit" located within New York State. They also used the original-cost-less-depreciation method, apparently taking as original cost figures and depreciation rates those used in determining petitioners' "rate bases" by the Public Service Commission and the Federal Energy Regulatory Commission.

Trial Term rejected the valuations of petitioners' experts, finding that capitalization-of-income was an inappropriate method for determining the value of a special franchise such as that under consideration here because, *inter alia* "[t]he basic premise of the income method is that property is worth a certain capitalization of the income it produces. While this system is a complex system with each part necessarily relying upon other parts, the uniform allocation of earning power based upon original cost is risky, at best. Some parts of the system may very well throw off earnings at a greater percentage of cost than a corresponding and physically equal part."

Trial Term concluded, as a matter of law, that "[t]he subject special franchise property is specialty property within the definition set forth in [*Matter of County of*] *Suffolk* (*Van Bourgondien*) [47 NY2d 507]", and that "[p]etitioners failed to demonstrate that the method by which [SBEA] arrived at the 1980 assessments was incorrect." Accordingly, the petitions were dismissed.

The Appellate Division reversed, granted the petitions to the extent of annulling the final 1980 assessments and remitted the matter to SBEA for "reconsideration in light of the fact that the capitalization of income method is an acceptable method for assessing the value of the property

at issue" (103 AD2d 187, 189). Citing *Brooklyn Union*, where it had held that property similar to that which is the subject of these appeals is not specialty property and that the capitalization-of-income method would therefore be permissible as a means of valuation, the court concluded that this record "demonstrates no reason to treat the property involved here differently *** for the purpose of determining that it is not specialty property" (*id.*).

II

The courts of this State have uniformly held that the appropriate method of valuing the tangible component of special franchise property is by the reproduction-cost-new-less-depreciation method (*People ex rel. Delaware, Lackawanna & W.R.R. Co. v Clapp*, 152 NY 490; *People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Commrs.*, 196 NY 39; *Matter of Onondaga County Water Dist. v Board of Assessors*, 39 NY2d 601; *Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 101 Misc 2d 910, *mod on other grounds* 83 AD2d 355, *affd* 58 NY2d 710). This is because such property is considered to be "specialty property" property designed for "unique" purposes or is "uniquely adapted" to the business conducted upon it or use made of it, for which there is no market, and which cannot be converted to other uses without the expenditure of substantial sums of money (*Consolidated Edison*, 101 Misc 2d, at pp 913-914, *supra*).

In *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.)* (47 NY2d 507, 512), we reaffirmed that a property is a "specialty" when it meets the four criteria enunciated by the Appellate Division in *Matter of County of Nassau (Colony Beach Club)* (43 AD2d 45, *affd* 39 NY2d 958): "(a) [t]he improvement must be *unique* and must be specially built for the specific purpose for which it is designed; (b) [t]here must be a *special use* for which the improvement is

designed and the improvement must be so specially used; (c) [t]here must be *no market* for the type of property *** and no sales of property for such use; and (d) [t]he improvement must be an appropriate improvement at the time of the taking and its use must be *economically feasible and reasonably expected to be replaced"* (43 AD2d, at p 49 [emphasis in original]).

There can be no doubt that the special franchise properties of Brooklyn Union, Distribution and Supply fully satisfy the first three criteria for "specialty property" set forth above.

The evidence in both cases establishes conclusively that the underground mains, pipes, services and related measuring and regulatory equipment that comprise the tangible special franchise property placed in the public streets and thoroughfares for the transmission of natural gas are "unique" and "specially built for the specific purpose for which [they were] designed". This equipment was designed for the "special use" of distribution of natural gas and is being "specially used" for that purpose. It is "*uniquely* adapted to the business conducted upon it or use made of it *and* cannot be converted to other uses without the expenditure of substantial sums of money" (*Matter of Great Atl. & Pac. Tea Co. v Kiernan*, 42 NY2d 236, 240). Clearly, there is no market for this specially designed property, nor is there any evidence that there have been any sales of similar such property for such use.

Nonetheless, the trial court in *Brooklyn Union* found that the system "would not be reproduced in its present form". The Appellate Division agreed and held that because it is "unreasonable to conclude that the facility could be replaced on an economic basis", the property "c[an] not be considered a specialty." This view misperceives the meaning of the requirement that in order for a property to qualify as "specialty" property "the improve-

ment must be an appropriate improvement—and its use must be economically feasible and reasonably expected to be replaced". This requirement relates to the *use* or *function* of the property and means that *use* or *function* must [be] reasonably expected to be replaced. As we pointed out in *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.)* (*supra*), "[t]he last requirement is that at the time of the taking the improvement be appropriate both physically and economically *** Economic appropriateness means simply that the *use* must be economically feasible and reasonably expected to be replaced" (*id.*, at p 513 [emphasis added]). It is manifest that the use or function to which the tangible special franchise property of these utilities is put would be replaced or reproduced. Indeed, in *Brooklyn Union,* the Appellate Division found that "the system *** would be replaced with a new completely modern system" (101 AD2d, at p 416). However, it is not necessary in order for a property to qualify as a "specialty" that the material of which it is originally composed be available or replicated. Significantly, while both courts in *Brooklyn Union* found that the system would not reasonably be expected to be replaced, the trial court in *Distribution* and *Supply* concluded just the opposite. Yet without discussion or explanation, the Appellate Division in the latter case apparently deemed its decision in *Brooklyn Union* to be controlling, and thus rejected the RCNLD valuation. Nonetheless, the Appellate Division observed in *Matter of Tenneco, Inc.-Tennessee Gas Pipeline Div. v Town of Cazenovia,* 104 AD2d 511), decided the same day as *Distribution* and *Supply* and likewise involving the assessment of natural gas transmission lines, that the trial court in that case properly found the pipeline property to be a specialty. The *Tenneco* court stated that: "The subject property meets the requirements for such treatment set forth by the Court of Appeals in *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.)* (47 NY2d 507, 512).

The pipeline is unique and specially built for the purpose of transporting natural gas and is used for that purpose. There is no market for the type of property and there are no sales of property for such use. It could not be converted without substantial expenditures and it is an appropriate improvement, which if destroyed, would be reasonably expected to be replaced or reproduced (cf. *Matter of Brooklyn Union Gas Co. v State Bd.*, 101 AD2d 414)." (104 AD2d 511, 512, *supra.*)[2] The *Tenneco* court further observed that, "[p]etitioner's reliance upon cases applying the net earnings rule to value special franchises for the proposition that income capitalization based on earnings is an appropriate method is misplaced. The leading case of *People ex rel. Jamaica Water Supply Co. v State Bd.* (196 NY 39) illustrates that the net earnings method, which capitalizes the net earnings of the taxpayer, is used to value the intangible franchise for special franchise tax purposes. There the value of the tangible real property was determined on a cost basis" (*id.*, at pp 512-513).

So too, in these cases, the value of the tangible property properly should be determined on a cost basis. Although there is a difference between valuing property by means of the reproduction cost as opposed to using the replacement cost, this fact does not deny to special franchise property the status of "specialty" property, to be valued as such where replacement cost is used rather than reproduction cost, nor does it warrant utilizing the capitalization-of-

2. The court noted in *Tenneco*, without elucidation as to the relevant distinction, that the "instant proceeding involves a real property tax assessment as opposed to a special franchise tax assessment." That to attain the full value of a special franchise, the intangible component must be valued and added to the value of the tangible property does not preclude the tangible property component being considered a "specialty" to be valuated by RCNLD, especially since a special franchise, is by definition, considered to be "real property" (RPTL 102 [17]).

income method of valuation with respect to petitioners' tangible property.

We hold, therefore, that the special franchise properties of Brooklyn Union, Distribution and Supply are "specialty properties" and that the proper method of valuing their tangible property is by RCNLD, to which should be added, in order to determine the full value, the value of the intangible franchise (the right to use the public streets and thoroughfares for the placement of their tangible property), arrived at by capitalization-of-income, where there exists excess income, or by adding 5% of the value of the tangible real property where there is no excess income.

Accordingly, the order of the Appellate Division in *Matter of National Fuel Gas Distrib. Corp.* should be reversed and the judgments of the Supreme Court dismissing the petitions reinstated. The order of the Appellate Division in *Brooklyn Union Gas Co.* should be reversed, the petition dismissed and SBEA's determination reinstated.

Chief Judge WACHTLER and Judges JASEN, MEYER, SIMONS, KAYE and TITONE concur.

In *Matter of Brooklyn Union Gas Co. v State Bd.:* Order reversed, with costs, petition dismissed, and the determination of the State Board of Equalization and Assessment reinstated.

In *Matter of National Fuel Gas Distrib. Corp. v State Bd.:* Order reversed, with costs, and the judgments of Supreme Court, Albany County, reinstated.

Appendix B

Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, May 24, 1984

In the Matter of BROOKLYN UNION GAS COMPANY, Respondent, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Appellant, and CITY OF NEW YORK, Intervenor-Appellant.

APPEARANCES OF COUNSEL

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Frederick A.O. Schwarz, Jr., Corporation Counsel (*John P. MacArthur* of counsel), for intervenor-appellant.

Cullen & Dykman (*F. Peter O'Hara, Lewis Orgel* and *Herman Meltzer* of counsel), for respondent.

OPINION OF THE COURT

KANE, J.

Petitioner is a distributor of natural gas servicing Kings County, Richmond County and one half of Queens County. In April, 1980, the State Board of Equalization and Assessment (SBEA) made a tentative equalized valuation of petitioner's special franchises for the tax year 1980-81. Dissatisfied with the equalization rates employed and the assessments made, petitioner filed for a reduction in the valuation and assessment of its special franchises. This complaint, however, resulted in an increase in the final equalized valuation, reflecting a revised city-wide equalization rate, rather than the sought after reduction. Petitioner then instituted this proceeding against the SBEA pursuant to article 7 of the Real Property Tax Law challenging its final equalized valuation of $138,533,622 for Kings County, $76,771,033 for Queens County and $46,284,099 for Richmond County on the ground of overvaluation, inequality

and illegality. The two latter grounds were subsequently abandoned, and at trial petitioner limited its proof to overvaluation. The City of New York was granted permission to intervene in this proceeding.

Conflicting expert testimony was presented at trial by petitioner and the City of New York, with the SBEA adopting the testimony of the city's expert and not presenting any independent expert of its own. The witnesses disagreed, both as to value and the method of determining value. At the conclusion of the trial, the court, in a written decision, adopted the theory of petitioner's experts, rejected the testimony of the city's expert, and found that petitioner had overcome the presumption of validity of the SBEA's assessments. In accordance with its findings, the judgment of the court reduced the special franchise assessments to $83,336,183 for Kings County, $45,511,625 for Queens County and $25,990,355 for Richmond County.

The key issue to be resolved on this appeal is whether the court was correct in accepting petitioner's evidence of valuation and, particularly, the capitalization of income approach used by its appraisers in determining value.

[1] It is the rule that courts should not establish an exclusive rule for franchise valuation which would apply in all cases. However, if in a particular case there is only one reasonable method of determining the true value of the special franchise, it is the duty of the assessing authority to use that method (*People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Comrs.*, 196 NY 39, 51). Applying that rule to the matter at hand, we conclude that the trial court was correct. Petitioner's physical facilities are a combination of old and new. Some 63% of its transmission lines are large cast iron mains with joints every 10 feet, operating at low pressure and requiring frequent repairs, while others are high pressure lines of steel which also require replacement with modern noncorrosive materials.

Appendix B

Changes in demand for gas, both residential and commercial, require continuous modifications and improvements necessitating over 26,000 permits from the city in the year 1979 alone. Under these circumstances, both of petitioner's appraisers, recognized experts in the field of public utilities and eminently qualified, rejected the reproduction cost less depreciation method for determining value. The record demonstrates the validity of that reasoning for the simple reason that the system would never be reproduced in its present form but would be replaced with a new completely modern system. Reproduction means replacement with an exact model, in the parlance of an expert real estate appraiser. In this case, such a procedure is totally unrealistic.

Because of the unusual nature of a special franchise, a difficult appraisal problem is presented. We are of the view that the method selected by petitioner's appraisers was proper. It was, essentially, the capitalization of income method of approach, arrived at by calculating the income attributable to the special franchise by determining the ratio of rate base value of the special franchise to the total rate base value of the entire facility, and applying that ratio to petitioner's operating income. The over-all rate of return applied to income was obtained by traditional methods after examining returns on equity throughout the entire gas industry. Since the market data approach could not be considered because of the lack of comparable sales, and the facility could not be considered a specialty since it is unreasonable to conclude that the facility could be replaced on an economic basis (*Matter of County of Suffolk* [*C.J. Van Bourgondien, Inc.*], 47 NY2d 507, 511; *Colonie Hill v Boncore,* 87 AD2d 581, mot for lv to app den 57 NY2d 608), the capitalization of income method used herein provides the most accurate method of determining value (*Matter of Food Fair v Board of Assessment Review,* 78 AD2d 335, 337; *Matter of Niagara Mohawk*

Power Corp. v. Public Serv. Comm., 52 AD2d 388, 390, mot to dismiss app granted 40 NY2d 844, mot for lv to app den 40 NY2d 806). Moreover, we would reach the same result even if the facility was considered a specialty.

[2] Additionally, we find no error in the trial court's initial determination that the city's expert witness was qualified as such and thereafter rejecting his entire testimony when his relative lack of adequate qualifications on the issue at hand became manifest (*Felt v Olson*, 74 AD2d 722, affd 51 NY2d 977). Furthermore, the court properly rejected his testimony as entitled to no weight, since it was founded upon an unacceptable method of valuation. Finally, we view the SBEA's argument that they were deprived of the testimony of their own appraiser as a result of the court's ruling without merit. If, as contended, their appraiser had been in the courtroom and available, an application to the court for an opportunity to produce this witness could have been made at any time. The SBEA elected to rely upon the city's appraiser, and they are bound by their own judgment and trial strategy.

[1] In summary, the record demonstrates that the presumption of validity of the SBEA assessment has been overcome and the method of assessment offered by petitioner was correct in both form and application (*Matter of Katz Buffalo Realty v Anderson*, 25 AD2d 809).

The judgment should be affirmed, with costs.

MAIN, YESAWICH, JR., and HARVEY, JJ., concur.

Judgment affirmed, with costs.

Appendix C

Opinion of the Supreme Court, Albany County, May 24, 1983

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of THE BROOKLYN UNION GAS COMPANY,

Petitioner,

-against-

Index No. 6961/80

STATE BOARD OF EQUALIZATION AND ASSESSMENT and THE CITY OF NEW YORK,

Respondents.

(Supreme Court, Albany County Trial Term,
Commencing April 28, 1982)
(Calendar No. N-120)

(JUSTICE HAROLD J. HUGHES, PRESIDING)

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Appendix C

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HUGHES, J.:

Petitioner brings this certiorari proceeding under article 7 of the Real Property Tax Law to review the special franchise assessments levied by the State Board of Equalization and Assessment (SBEA) against petitioner's special franchise property located in the boroughs of Brooklyn, Queens and Staten Island for the tax year beginning July 1, 1980 and ending June 30, 1981. In the petition the Brooklyn Union Gas Company (Brooklyn Union) asserted claims of over-valuation, inequality, illegality, and unconstitutionality of sections 600 and 606 of the Real Property Tax Law. Upon trial, petitioner presented evidence and legal arguments solely as to over-valuation, apparently abandoning its other claims. The petitioner advanced its case through the testimony of its senior vice-president and chief engineer, Frederick W. Sullivan; its vice-president and chief accounting officer, Fred J. Gentile; and two expert appraisers, Julius Breitling and John E. Green. The written appraisals of Breitling and Green were received in evidence. The respondent SBEA did not file an appraisal or offer any witnesses on its own behalf, instead joining in the appraisal and expert testimony offered by co-respondent intervenor City of New York.

The property being valued in this proceeding is a special franchise, which is defined in subdivision 17 of section 102 of the Real Property Tax Law as:

"[t]he franchise, right, authority or permission to construct, maintain, or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance. For purposes of assessment and taxation a special franchise shall include the value of the tangible property situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith. The term special franchise shall not include property of a municipal corporation or special district, nor shall it include a crossing less than two hundred fifty feet in length of a public street, highway, water or other public place outside a city or village, unless such crossing be the continuation of an occupancy of another public street, highway, water or other public place."

Section 606 of the Real Property Tax Law directs the SBEA to determine a special franchise assessment in the following manner:

"1. Notwithstanding the provisions of section three hundred six of this chapter, in determining a special franchise assessment the state board shall apply the latest state equalization rate or special equalization rate established pursuant to subdivision two of this section to the full value of such assessment, except that the state board shall apply the nineteen hundred fifty-three state equalization rate to any portion of the value of the special franchise which was assessed for the year nineteen hundred fifty-three, and; provided, however, that in determining the assessed value of a special franchise in an assessing unit which, subsequent to nineteen hundred fifty-three, has completed a revaluation in compliance with the standard of

section three hundred six of this chapter, the state board shall apply the latest state equalization rate or special equalization rate established pursuant to subdivision two of this section to the full value of all such property, notwithstanding the foregoing exception for property assessed in nineteen hundred fifty-three."

"2.a. The state board may establish a special equalization rate for special franchise assessment purposes when there has been a change in the level of assessment on the assessment roll for which a special franchise assessment is to be determined, upon its own motion or upon application of a special franchise owner or an assessing unit in which the special franchise property is located. As used in this subdivision, the term 'change in the level of assessment' means the net increase or decrease in the assessed valuation of the taxable property in the assessing unit as a result of assessing such property at a higher or lower ratio of full value."

"b. The assessor is hereby authorized and directed to make the changes, if any, occurring as a result of the application of this section on the assessment roll notwithstanding the fact that he may receive the determination of the final assessment of any special franchise after the final completion, verification and filing of such assessment roll. Other local officers, including school authorities, having custody and control of such roll, are also hereby authorized and directed to make any such changes."

Under the statute SBEA is to determine the full market value of the special franchise and apply to that portion that was on the assessment rolls for the year 1953 the equalization rate for 1953, and to that portion added thereafter, the latest State or special equalization rate.

Against that background, and upon the testimony, and exhibits admitted into evidence, the court makes the following findings of fact:

1. The petitioner is a corporation engaged in the distribution of natural gas in the boroughs of Brooklyn, Queens and Staten Island.

2. The SBEA is a State agency charged by statute with the exclusive authority to determine the assessed value of all special franchise properties located in the State.

3. The respondent-intervenor City of New York is a municipal corporation in which the petitioner operates through its special franchises.

4. The petitioner operates its gas distribution business through a system of underground mains, services, and related measuring and regulating equipment.

5. The natural gas distributed by petitioner flows from interstate pipelines into New York Facilities Mains, a joint operation of petitioner, Consolidated Edison and Long Island Lighting Company.

6. The gas is then distributed through Brooklyn Union's high pressure mains and eventually reduced by governors to the lower pressure required for the older mains and service lines.

7. 63% of petitioner's system is composed of cast iron mains with joints which operate at fifteen pounds of pressure.

8. Petitioner has not installed any new cast iron pipes since the mid-1950's, and subsequent rules of the Public Service Commission prohibit the installation of cast iron pipe at the present time.

9. The cast iron mains, being the older portion of the system, are prone to leak at the joints, which requires repair through the use of joint clamps.

10. 34.25% of petitioner's main system is steel, and .75% is plastic, both of which operate at sixty pounds of pressure.

11. 2% of the system is comprised of New York Facilities Mains which can operate at up to 350 pounds of pressure.

12. As of December 31, 1979 petitioner had a total of 19,891,993 feet of mains in service, of which 19,615,125 were located under public streets.

13. In 1980 petitioner dispensed approximately 107 billion cubic feet of gas to approximately one million customers.

14. The operation of petitioner's business requires it to have continuing access to various portions of its mains for repairs, replacement, or relocation, and in order to excavate it needs a permit from the City of New York, of which 26,016 were obtained during 1979.

15. On June 19, 1980 the SBEA issued its certificate of final special franchise assessments against petitioner's special franchises as follows: for the County of Kings a final assessment of $138,533,622; for the County of Queens a final assessment of $76,771,033; and for the County of Richmond a final assessment of $46,284,099.

16. In this proceeding the valuation day has been stipulated as January 25, 1980.

17. The special equalization rate for the City of New York for the tax year in question was 49.36%.

18. The 1953 State equalization rates were as follows: for Kings County 98%; for Queens County 93%; and for Richmond County 96%.

19. Petitioner's special franchise property located in the County of Richmond had a full valuation in the year 1953 of $3,544,300.

Appendix C

20. Petitioner's special franchise property located in the borough of Queens had a full valuation in 1953 of $15,871,700.

21. Petitioner's special franchise property located in the borough of Kings for 1953 had a full valuation of $27,090,800.

22. The full 1953 value of petitioner's special franchise property located in the Counties of Kings, Queens and Richmond is $46,506,800 which, when equalized under the applicable rates, produces an assessed value of $44,712,193.

The court must determine if the SBEA's valuation is correct and, if not, to determine the correct value (*People ex rel. City of New York v Keeler*, 237 NY 332, 334). The value arrived at by the SBEA has a presumption of validity (*People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Comrs.*, 196 NY 39, 53), which presumption disappears once the petitioner establishes a prima facie case to the contrary (*People ex rel. Beardsley v Barber*, 266 AD 371, affd 293 NY 706). Once the petitioner has removed the presumption by introducing substantial evidence sufficient to create a question of fact on the valuation issue, the trial proceeds *de novo* with both sides put to the burden of proving the merit of their positions (*Matter of Katz Buffalo Realty Inc. v Anderson*, 25 AD2d 809). In *Matter of Consolidated Edison Co. of N.Y. v Equalization & Assessment* (83 AD2d 355, 357 affd 58 NY2d 710; see also *Matter of Brooklyn Union Gas Co. v State Bd. of Equalization & Assessment*, 85 AD2d 756, affd 58 NY2d 713), the Third Department instructed that in a special franchise tax review proceeding the function of the court is as follows:

> "The sole duty of the court in this proceeding ultimately will be to determine whether the SBEA assessment method was correct in form and application."

Determination of that issue is almost impossible in this case. Initially, the court notes the rule that no pretrial discovery is permissible to "examine the SBEA's assessors as to the mental processes and formulae they used in arriving at their determination" (*Matter of National Fuel Gas Distr. Co. v State Bd. of Equalization & Assessment,* 86 AD2d 707). Sometimes the SBEA's assessment method can be determined from the appraisal report submitted under 22 NYCRR 839.2 or by trial testimony of the Agency's employees. In this case the SBEA did not file an appraisal, nor did it offer any testimony through its personnel as to its assessment method. Instead, it relied upon the filed appraisal and testimony of the City's expert, Jack C. Emery. Mr. Emery used the reproduction cost new less depreciation method to arrive at a value more than $100,000,000 higher than that arrived at by the SBEA. Certainly Mr. Emery did not perform the original assessments on behalf of the SBEA and there is no indication in the record that the Agency employed the same assessment method or figures. The result is that the court is totally in the dark upon the central issue it is required to decide, i.e., "whether the SBEA assessment method was correct in form and application". This court will not presume to do what the trial court did in *People ex rel. Jamaica Water Supply Co. v. State Bd. of Tax Comrs.* (196 NY 39, *supra,* 53-55) and assume that the SBEA used a certain valuation method. Instead, the court will ascertain the full value of petitioner's special franchises from the proof in the record since the ultimate "concern is with the assessment imposed and not the manner in which the assessment was determined" (*Consolidated Edison Co. of N.Y. v State Bd. of Equalization & Assessment,* 112 Misc 2d 422, 423).

Proof of the value of a special franchise is essentially a matter of expert testimony (see Lee & LeForestier, Review and Reduction of Real Property Assessments in New

York, 2d ed, §§819, 820, pp 341-343). The SBEA, not having filed an appraisal, is subject to the rule set forth in 22 NYCRR 839.2 (subd [d]) which provides:

> "Upon the trial of the proceedings, all parties shall be limited in their affirmative proof of value to matters set forth in their respective appraisal reports. Any party who fails to file an appraisal report as herein required shall be precluded from offering any appraisal testimony on value".

While SBEA was precluded from offering direct proof of value, its evaluation could be sustained if other evidence in the record supported it (*Amsterdam Urban Renewal Agency v Jacobson*, 85 Misc 2d 869). The weight to be accorded an expert's opinion is a matter for the trier of fact (*Coates v Peterson & Sons*, 48 AD2d 890). The background and qualifications of the expert are significant in determining the weight to be accorded to his testimony (*Semple School for Girls v Boyland*, 308 NY 382). On that score, the City's expert testified to the following qualifications: (1) he did not graduate from college; (2) he completed 16 credit hours in the area of appraisal at Pennsylvania State University in order to qualify for a broker's license in that state, and has taken no other formal courses in appraising; (3) he has never taken a course with respect to the appraisal of utilities; (4) none of the courses he has taught or seminars in which he has taken part dealt with the assessment of utility properties or special franchise properties; (5) he is not a licensed engineer or architect; (6) he has never worked as a contractor; (7) he has never worked for a gas utility or been involved in the sale or purchase of utility property; (8) prior to this court appearance he had never appraised a special franchise property of a gas utility; (9) although he is a senior member of the American Society of Appraisers his category of expertise is intangible assets and he is not listed by that society as an appraiser designated in the public utility class. In addition

to the foregoing, the appraisal filed by Mr. Emery failed to comply with the rule of the Appellate Division as to form and content. The court concludes that Mr. Emery's appraisal of the value of petitioner's special franchise is entitled to no weight.

Having rejected respondent's expert testimony, the court must accept the testimony of petitioner's experts as to valuation or supply an adequate rationale supported by the record for reaching a different result (*Matter of Rochester Urban Renewal Agency v. Phillips,* 60 AD2d 752; *Lawyers Co-op Pub. Co. v State of New York,* 47 AD2d 122, affd 39 NY2d 760; *Clearwater v State of New York,* 30 AD2d 883, affd 23 NY2d 1006). The court has considered the testimony and appraisals of petitioner's experts, who arrived at valuation through capitalization of income, and original cost less depreciation (rate base). Capitalization of income is a legitimate appraisal method for valuing a special franchise (*People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Comrs.,* 196 NY 39, *supra*), especially when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form. The valuation methods employed by petitioner's expert Julius Breitling are correct in form and application, and there is nothing in the record to lead the court to a contrary opinion. In view thereof, the court makes the following determinations:

a) The highest and best use of the property is its present use.

b) The system would not be reproduced in its present form.

c) The full value of petitioner's special franchises is $267,819,000 attributable as follows: $141,596,000 to Kings County; $77,060,000 to Queens County; and $49,163,000 to Richmond County.

d) The portion of the value of the special franchise property located in Richmond County which was assessed for the year 1953 is $3,544,300 which, when applying the equalization rate of 96%, results in an equalized value of $3,402,528.

e) The post-1953 value of the special franchise property located in Richmond County is $45,761,474 which, when applying the equalization rate of 49.36%, produces a figure of $22,587,827.

f) The final assessment for the County of Richmond for the tax year in question is $25,990,355.

g) The full value of the portion of the special franchise in Queens County which was assessed for the year 1953 was $15,871,700 which, when assessed at the equalization rate of 93%, produces an equalized rate of $14,760,681.

h) The present full value of the special franchise property located in Queens County minus that portion assessed for the year 1953 is $62,299,319 which, upon applying the equalization rate of 49.36%, results in a figure of $30,750,934.

i) Combining the two figures renders an equalized value of the special franchise in Queens County for the tax year involved of $45,511,625.

j) The portion of the value of the special franchise which was assessed in Kings County for the year 1953 was $27,090,800, which, when applying the equalization rate of 98%, produced an assessed value of $26,548,984.

k) The portion of the full value of the Kings County special franchise excluding the 1953 portion is $115,047,016, which, by applying the equalization rate of 49.36%, results in a figure of $56,787,199. Combining the two figures results in an equalized value of the special franchise located in Kings County of $83,336,183.

Appendix C

The court will grant judgment to the petitioner, without costs, adjudging the equalized value of petitioner's special franchises for the Counties of Kings, Queens and Richmond, to be in the amounts set forth in this decision. Petitioner is directed to submit a proposed judgment on notice.

Dated: May 24, 1983

Appendix D

Final Judgment of the Court of Appeals of the State of New York, August 1, 1985

STATE OF NEW YORK
SUPREME COURT — ALBANY COUNTY

BROOKLYN UNION GAS COMPANY,
Petitioner-Respondent,
-against-
STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Respondent-Appellant,
and
THE CITY OF NEW YORK,
Intervenor-Appellant.

JUDGMENT
INDEX NO. 6961-80
DOL NO. 84025775

The Respondent-Appellant herein, represented by Robert Abrams, Attorney General of the State of New York, State Capitol Building, Albany, New York, 12224, having been granted permission to appeal to the Court of Appeals from an order of the Appellate Division, Third Department entered June 5, 1984, which affirmed a judgment of the Supreme Court, Albany County at Special Term (Hughes, J.), entered June 16, 1983, which granted petitioner's application, in a proceeding pursuant to Article 7 of the Real Property Tax Law, to, *inter alia,* reduce petitioner's special franchise assessments for the tax year 1980-81, and the Court of Appeals, after due deliberation, having rendered a decision on the 9th day of July, 1985, ordering that the order so appealed from be reversed, with costs, the petition dismissed, and the determination of the State Board of Equalization and Assessment reinstated, the Remittitur from the Court of Appeals having been filed in the office of the Clerk of Albany County, it is hereby

Appendix D

ADJUDGED, that the aforesaid order of the Appellate Division-Third Department be, and the same hereby is reversed, the petition dismissed, and the determination of the State Board of Equalization and Assessment reinstated, with costs of $2354.00 to be taxed against the Petitioner-Respondent, whose address is 176 Remsen Street, Brooklyn, New York, in favor of Respondent-Appellant, and that the Respondent-Appellant have execution thereon.

/s/ Marie A. Reilly

DEPUTY COUNTY CLERK

DATED AND ENTERED:
August 1, 1985

STATE OF NEW YORK
[SEAL] COUNTY OF ALBANY CLERK'S OFFICE ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy *Judgment* with the original thereof filed in this office on the *1* day of *Aug* 19 *85* and that the same is a correct transcript therefrom, and the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this *1* day of *Aug* 1985

/s/ Guy A. Paquin Clerk

Appendix E

Decision of the Court of Appeals of the State of New York Denying Petitioner's Motion for Reargument, October 8, 1985

3 Mo. No. 855

In the Matter of the Application
of THE BROOKLYN UNION GAS COMPANY
Respondent,

-against-

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellant,

and CITY OF NEW YORK,
Intervenor-Appellant.

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements to intervenor-appellant.

DECISION COURT OF APPEALS OCT 8 - 1985

Appendix F

Constitutional and Statutory Provisions Involved

1. The Constitution of the United States provides in pertinent part:

AMENDMENT V:

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

AMENDMENT XIV:

No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

2. Title 28 of the United States Code provides:

SECTION 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

3. The New York Real Property Tax Law, Section 102(17), defines "special franchise" as:

"Special Franchise" means the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place, mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam,

light, power, electricity, gas or other substance. For purposes of assessment and taxation a special franchise shall include the value of the tangible property situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith. The term special franchise shall not include property of a municipal corporation or special district, nor shall it include a crossing less than two hundred fifty feet in length of a public street, highway, water or other public place outside a city or village, unless such crossing be the continuation of an occupancy of another public street, highway, water or other public place.